

OFFICE OF SPECIAL MASTERS

Filed: July 30, 2002

HOLLY CLIFFORD, Administratrix of
the Estate of GREGORY CLIFFORD,

Petitioner,

v.

SECRETARY OF HEALTH AND
HUMAN SERVICES,

Respondent.

No. 01-424V
PUBLISHED

Ronald C. Homer, Boston, MA, for petitioners.
R. Lynne Harris, Washington, DC, for respondent.

DECISION

MILLMAN, Special Master

On July 23, 2001, petitioner, on behalf of her deceased husband, Gregory Clifford, filed a petition for compensation under the National Childhood Vaccine Injury Act of 1986¹ (hereinafter the "Vaccine Act" or the "Act"). Petitioner has satisfied the requirements for a prima facie case pursuant to 42 U.S.C. § 300aa-11(c) by showing that: (1) she has not previously collected an award

¹ The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, 42 U.S.C.A. §300aa-1 et seq. (West 1991), as amended by Title II of the Health Information, Health Promotion, and Vaccine Injury Compensation Amendments of November 26, 1991 (105 Stat. 1102). For convenience, further references will be to the relevant subsection of 42 U.S.C.A. § 300aa.

or settlement of a civil action for damages arising from the vaccine-related death, and (2) Mr. Clifford contracted polio from his daughter after she received polio vaccine in the United States.

On October 25, 2001, respondent conceded liability in this case. Under § 15(a)(2) of the Vaccine Act, in the case of a vaccine-related death, the special master shall award \$250,000 for the estate of the deceased.

On February 25, 2002, petitioner filed her Memorandum in Support of Petitioner's Right to Compensation, in Addition to Death Benefit, for Period of Time Between First Vaccine Symptom and Death, asserting that, in addition to the aforementioned \$250,000 as a death benefit, petitioner was entitled to actual unreimbursable medical expenses, her husband's actual lost earnings due to his vaccine injury, and an award for pain and suffering during the 14 months between the onset of her husband's vaccine injury and his death.

On April 5, 2002, respondent filed an Objection to Petitioner's Request for Compensation in Addition to Death Benefit.

On June 3, 2002, petitioner filed her Affidavit in Support of Her Claim for Compensation in Addition to the Death Benefit as P. Ex. 19A.

This case was transferred to the undersigned on June 24, 2002.

FACTS

Mr. Clifford was born on January 11, 1954. His baby daughter received oral polio vaccinations on May 28, 1998 and July 29, 1998. Mr. Clifford frequently changed her diaper when he was not working by driving a truck. On September 18, 1998, while driving in Corsicana, Texas, he went to an emergency room for several days of back pain, progressing to left leg weakness. The next day, he could not move his legs. His paralysis spread to his stomach, respiratory muscles, and

upper extremities. By September 21, 1998, he suffered respiratory failure and had to be intubated and put on a ventilator. On September 22, 1998, his doctors entertained the diagnosis of poliomyelitis. A tracheotomy tube was inserted on September 29, 1998, followed by a gastrostomy tube on October 1, 1998. He remained hospitalized at various institutions, suffering cardiac and respiratory difficulties, necessitating the insertion of a cardiac pacemaker. He died on November 18, 1999 due to respiratory failure secondary to pneumonia which was caused by paralysis from the polio virus infection.

DISCUSSION

The legal basis for petitioner's assertion that Mr. Clifford's estate is entitled to more than the death benefit described in § 15(a)(2) is one case, Lawson v. Secretary of HHS, 45 Fed. Cl. 236 (1999), in which the undersigned dismissed the suit, holding that Jennifer Lawson's death due to exsanguination from the rupture of a large blood vessel caused by an old tracheostomy was unrelated to her putative vaccine injury. Petitioners appealed and, in remanding for determination of whether there had been a vaccine injury, the Honorable James T. Turner, referring to § 15 (b) (applicable to pre-Act cases, i.e., cases arising before the effective date of the Act), stated:

Compensation awarded under the Program to a petitioner...may include the compensation described in paragraphs (1)(A) [for vaccine injury] and (2) [for vaccine death] of subsection (a) of this section and may also include an amount, not to exceed a combined total of \$30,000, for [attorney's fees and costs, lost earnings, and pain and suffering].

Judge Turner concluded that this statutory provision entitled petitioners to an award for both vaccine injury up to \$30,000 for lost earnings, pain and suffering, and attorney's fees even if they could not prove that Jennifer's death were related to her vaccine injury. In addition, Judge Turner stated that, if petitioners did prove that Jennifer's death were related to her injury, they could recover

\$250,000 in addition to the \$30,000 for attorney's fees, lost earnings, and pain and suffering. Id. at 237.

Although Judge Turner first stated that petitioners in Lawson would be entitled to recover damages for Jennifer's vaccine injury if they proved it had occurred, he narrowed the amount of that recovery in his next paragraph to the statutory ceiling of \$30,000. Judge Turner also stated that even if the petitioners in Lawson proved only that Jennifer had a vaccine injury, but not that she had a vaccine-related death, they could recover damages. Id. (The undersigned ruled on remand that petitioners failed to prove a vaccine injury. 2000 WL 246234 (Fed. Cl. Spec. Mstr. Feb. 14, 2000).)

Respondent asserts that §§ 15(a)(1)(A) (actual unreimbursable expenses and reasonable projected unreimbursable expenses), (3) (lost earnings), and (4) (pain and suffering) apply solely to post-Act petitioners who have vaccine injuries, while § 15(a)(2) (vaccine-related death) applies solely to post-Act petitioners who represent decedents who died from the effects of vaccination. In support of respondent's position, respondent cites a number of cases:

(1) Sheehan v. Secretary of HHS, 19 Cl. Ct. 320 (1990). The Honorable Moody R. Tidwell, III., held that the Act does not permit any award for a vaccine-related death above the amount of \$250,000 except for the additional award of attorney's fees. Id. at 320-21. Judge Tidwell stated:

This holding is governed by binding precedent which mandates a strict interpretation in favor of the United States of any statutory waiver of sovereign immunity. *See, e.g., Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983); *Zumerling v. Marsh*. 783 F.2d 1032, 1034 (Fed. Cir. 1986). Moreover, the statutory scheme for the national vaccine injury program, as well as the legislative history, compels the court to limit petitioner's award to death benefits and attorneys [sic] fees. The statutory scheme consistently draws a distinction between vaccine-related injury and vaccine related [sic] death. Sections which apply to both injuries or deaths specifically refer to "injuries or death." *See, e.g.,* 42 U.S.C. §§ 300aa-11 & 300aa-15(a).

Id.

Judge Tidwell continued:

Because compensation for vaccine-related deaths are explicitly limited by the plain language of section 300aa-15(a)(2) to \$250,000, plus reasonable attorneys' fees and other costs as provided in section 300aa-15(e), this court will not now reach beyond that clear statutory mandate to award additional compensation for lost wages or pain and suffering in the present action.

Id. at 321.

Judge Tidwell stated that his interpretation is consistent with legislative intent:

A House Report on this issue states that “allowable death benefits for a vaccine-related death are set at a level of \$250,000.” H.R. Rep., No. 99-908, 99th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 6287, 6344, 6362 (1986); *see also* H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess., *reprinted in* U.S. Code Cong. & Admin. News 2313-1, 2313-2661 (1987) (“compensation in the case of a vaccine-related death is set in law at \$250,000.”).

In addition, in articulating the difference between an award for pain and suffering and an award for a vaccine-related death, legislators stated that “as contrasted with the fixed death benefit, the award for pain and suffering is to be set at the discretion of the Master and of the Court.” H.R. Rep. No. 99-908, 99th Cong., 2d Sess., *reprinted in* U.S. Code Cong. & Admin. News 6344, 6362 (1986). From these statements, as well as the plain language of the statute, the court finds it abundantly clear that Congress intended to distinguish between deaths and injuries by limiting the waiver of sovereign immunity for a vaccine-related death to an award of \$250,000 plus reasonable attorneys' fees and costs.

Id.

(2) Vijil v. Secretary of HHS, No. 91-1132V, 1993 WL 177007 (Fed. Cl. Spec. Mstr. May 7, 1993). Petitioner on behalf of the estate of her son sought not only the \$250,000 death benefit, but also \$133,00 for unreimbursed medical expenses. Special Master George L. Hastings rejected petitioner's argument, stating:

Congress' election to use “injury or death” in most places, but only “injury” or only “death” in a few specific provisions, suggests that Congress viewed the two situations as quite distinct for analytical purposes.

This inference is buttressed by the fact that in those few instances where Congress referred only to an “injury” or only to a “death,” a clear intent to treat the two situations *differently* is apparent.

Id. at *2.

The special master also discussed the distinction between the statutes of limitations for petitions brought for vaccine injuries (36 months from onset of injury) and vaccine deaths (24 months from death or 48 months from onset of symptoms), and the (now-defunct) requirement for expending \$1,000 in unreimbursable medical expenses for a vaccine injury but not for a vaccine death in order to have a valid petition. See §§ 16(a)(2) and (3), and 11(c)(1)(D)(i) and (ii). He concluded:

Thus, this *overall* pattern of statutory usage of the terms “injury” and “death” lends credence to the argument of respondent here, that in § 300aa-15(a)(1)(B), the term “vaccine-related injury” was intended to limit compensation to those cases in which the vaccine recipient is *not* deceased. Simply put, the inference can be drawn that when Congress intended a provision to apply to situations where the recipient was *either* alive or dead, the phrase “injury or death” was used; when Congress intended application only to living persons, the term “injury” was used; and when Congress intended application only to deceased persons, the term “death” was used.

Id. at *3.

The special master cited further support for his interpretation than Judge Tidwell did in Sheehan, *supra*. Legislation modified the Vaccine Program in 1987. The House Report pertaining to that modification contains a document that the Congressional Budget Office prepared, stating, “Compensation in the case of a vaccine-related death is set in law at \$250,000.” H.R. Rep. No. 100-391(I), 100th Cong., 1st Sess., p. 695, *reprinted in* 1987 U.S. Code Cong. & Admin. News, pp. 23113-61. Id.

The special master quoted from three predecessor vaccine compensation bills in 1983 and 1984 which provided not only for a particular range of death benefit, but also for any unreimbursed expenses occurring prior to death. The bill that ultimately became the Vaccine Act omitted the provision providing for unreimbursed expenses. The special master concluded that Congress

considered the prior language proffered in the three previous bills, but decided not to include it in the bill that it enacted into law, while setting the death benefit at a fixed \$250,000. *Id.* at *5.

(3) *Andrews v. Secretary of HHS*, 33 Fed. Cl. 767 (1997). Respondent's citation of this case seems inapposite. In *Andrews*, the vaccinee's parents brought a petition for vaccine injury before she died. Rather than bring a petition for vaccine-related death (since her death was not related to her vaccine injury), the parents continued their vaccine injury petition, seeking pain and suffering damages, which Special Master Richard B. Abell awarded. Judge Tidwell affirmed the award. This limited holding is distinguishable from the instant action because petitioner herein filed both her injury and death claims after her husband died.

Although respondent does not cite *Buxkemper v. Secretary of HHS*, 32 Fed. Cl. 213 (1994), it is on point. The Honorable Judge Marian Blank Horn held that the estate of a boy who purportedly suffered a vaccine injury, but died from causes unrelated to his vaccination was not entitled to any award for pain and suffering dating from the putative vaccine injury until death. *Id.* at 225. Judge Horn, after reviewing *Vijil*, *supra*, stated:

[T]his court is persuaded that the conferees, as manifested in the words of the statute and in the legislative history, intended either compensation for individuals who continue to suffer from a vaccine injury and will have to deal with the costs of that injury for the remainder of his/her life, or death benefits, of up to \$250,000.00, to the estates of those who have died as a result of a vaccine-related injury.

Id.

Petitioners in *Buxkemper* also argued, as petitioner in the instant action does, that state law (Texas in *Buxkemper*; New York in the instant action) permitting survival of personal injury damages in death cases should apply herein. Judge Horn rejected this argument, stating:

The United States Court of Federal Claims, however, does not incorporate state laws in their [sic] standards. *Van Epps v. Sec'y DHHS*, 26 Cl. Ct. 650, 653 (1992). The Vaccine Act is a federal act.

Id.

Following Buxkemper is Cohn v. Secretary of HHS, 44 Fed. Cl. 658 (1999), in which the Honorable Christine O.C. Miller held that the court had no jurisdiction for petitioners' claim for damages for pain and suffering following a vaccine injury when they filed their petition after their daughter died from a non-vaccine-related cause. In comparing state laws which permit personal injury claims to survive death (contrary to common law), Judge Miller stated:

Given that Congress intended to provide a speedy resolution to vaccine-injury claims, while at the same time stem the rising tide of vaccine-related litigation, it is reasonable to presume that in drafting the Vaccine Act, Congress sought, in part, to revert to the common law principle that personal injury claims do not survive the death of the injured party. ... Petitioners who file an injury claim on behalf of an estate do not qualify for compensation under a plain reading of the Vaccine Act.

Id. at 661.

Due consideration of the above legislative history and case law compels the undersigned to conclude that petitioner in the instant action is entitled to an award solely of \$250,000 plus reasonable attorney's fees and costs. She may feel this is an unfair result, but it is consistent with the Act.

Congress, in creating legislation termed the National Childhood Vaccine Injury Act, may not have contemplated its applicability to adult vaccinees who were wage-earners when it enacted the provision determining \$250,000 as the death benefit. Congress also seems not to have envisioned instances where a vaccinee of any age had prolonged hospitalization before dying from a vaccine injury. Redress in the civil courts is an option in those cases in which economic loss and/or hospitalization costs far exceed the statutory death benefit. Section 300aa-21(a) permits petitioner to elect to file a civil action for injury or death.

The undersigned holds that petitioner is entitled to an award of \$250,000.00.

CONCLUSION

The Vaccine Injury Act provides a death benefit of \$250,000.00 to be paid to the decedent's estate. 42 U.S.C. 300aa-15(a)(2). In the absence of a motion for review filed pursuant to RCFC Appendix B, the clerk of the court is directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

DATE

Laura D. Millman
Special Master